REPUDIATION OF CONTRACTS.

II.

ON repudiation of a contract the aggrieved party must have a remedy on the contract. The only question can be what he must do in order to perfect his right of action.

If he has already performed all that the contract required of him, there can be no doubt that he may sue at once on the contract if the time when the defendant's performance was due has arrived. Whether suit may be brought at once even though that time has not arrived will be discussed later.

The situation is in legal effect similar when the injured party has not fully performed, but is literally prevented by the other party from continuing performance. Where work requires some coöperation of both parties this frequently happens. Though the plaintiff's damages may not be the same as if he had fully performed, his right of action is as complete, for when the defendant has himself caused the plaintiff's non-performance he cannot take advantage of it as a defence.

But if the injured party has not fully performed and is not prevented from continuing, yet because of the repudiation by the other party has just reason to believe that the latter will not fulfil his contractual obligation, the situation presents greater difficulty. In Frost *v.* Knight,[1] Cockburn, C. J., thus stated the law: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of

[1] L. R. 7 Ex. 111.

it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." [1]

This language was quoted with approval by Cotton, L. J., in Johnstone *v.* Milling,[2] and may be regarded as expressing the present understanding of English lawyers on the matter in question.[3] The alternative stated as permissible in the first paragraph of Lord Cockburn's statement is not allowed generally in this country. There is a line of cases running back to 1845 [4] which hold that after an absolute repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based on full performance. This rule is only a particular application of the general rule of damages that a plaintiff cannot hold a defendant liable for damages which need not have been incurred; or, as it is often stated, the plaintiff must, so far as he can without loss to himself, mitigate the damages caused by the defendant's wrongful act. The application of this rule to the matter in question is obvious. If a man engages to have work done, and afterwards repudiates his contract before the work has been begun or when it has been only partially done, it is inflicting damage on the defendant without benefit to the plaintiff to allow the latter to insist on proceeding with the contract. The work may be useless to the defendant, and yet he would be forced to pay the full contract price. On the other hand, the plaintiff is

[1] L. R. 7 Ex. 111, 112.

[2] 16 Q. B. D. 460.

[3] See *e. g.* Leake, Contracts (3d ed.), 752; Mayne, Damages (6th ed.), 179. It is also quoted and acted on in Dalrymple *v.* Scott, 19 Ont. App. 477.

[4] Clark *v.* Marsiglia, 1 Denio, 317, is the earliest decision. In this case the plaintiff was employed to clean and repair a number of pictures, for which the defendant agreed to pay. After the plaintiff had begun work upon them the defendant countermanded the order. The plaintiff nevertheless completed the work and sued for the full price. The court held he could recover only for what he had done before the order was countermanded, with such further sum as would compensate him for the interruption of the contract at that point.

Later decisions involving the same principle are Moline Scale Co. *v.* Beed, 52 Ia. 307 (*conf.* McAlister *v.* Safley, 65 Ia. 719); Black *v.* Woodrow, 39 Md. 194, 216; Heaver *v.* Lanahan, 74 Md. 493; Collins *v.* Delaporte, 115 Mass. 159 (*semble*); Gibbons *v.* Bente, 51 Minn. 499; Dillon *v.* Anderson, 43 N. Y. 231; Lord *v.* Thomas, 64 N. Y. 107 (*semble*); Johnson *v.* Meeker, 96 N. Y. 93; People *v.* Aldridge, 83 Hun, 279 (*semble*); Heiser *v.* Mears, 120 N. C. 443; Davis *v.* Bronson, 2 N. Dak. 300; Chicago, etc. Co. *v.* Barry, (Tenn.) 52 S. W. Rep. 451; Tufts *v.* Lawrence, 77 Tex. 526; Derby *v.* Johnson, 21 Vt. 17; Danforth *v.* Walker, 37 Vt. 239; 40 Vt. 257; Cameron *v.* White, 74 Wis. 425; Tufts *v.* Weinfeld, 88 Wis. 647.

interested only in the profit he will make out of the contract. If he receives this it is equally advantageous for him to use his time otherwise.

By every consideration of mercantile convenience these decisions are correct. The facts of the only case [1] which is directly opposed to them need only be stated to illustrate this. The defendant, resident in Illinois, contracted to buy of the plaintiff, resident in New Jersey, 500 tons of barbed wire. After 120 tons had been delivered the defendant requested the plaintiff to stop further shipments, and on the refusal of the latter, telegraphed, "Will not take wire if shipped." Nevertheless, the plaintiff went through the futile and expensive steps of preparing and sending the rest of the wire, and was held entitled to recover damages for so doing.

The English courts have recognized the duty of a plaintiff to mitigate or at least not to enhance the damages which a defendant is to be called upon to pay;[2] and it is quite possible that Lord Cockburn, in stating as he did the first alternative right of a party aggrieved by repudiation of a contract, did not appreciate that his statement justified a violation of that duty.[3] It need not be contended that in every case the principle of damages in question will deprive the plaintiff of the right to continue performance of the contract after it has been repudiated. There may be cases where so doing will not needlessly enhance damages. But it is clear that such cases must be exceptional.

Lord Cockburn's statement of the plaintiff's second alternative is that "The promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it." The two clauses of this sentence logically contradict each other. If the contract is put an end to, no action can be brought upon it. If an action may be brought upon it, either at once or at any time in the future, it is not put an end to. The question of the time when the action should be brought is not immediately essential

---

[1] Roebling's Sons' Co. *v.* Lock Stitch Fence Co., 130 Ill. 660. See, also, Lake Shore, etc. Ry. Co., 152 Ill. 59.

[2] Mayne, Damages (6th ed.), 180; Harries *v.* Edmonds, 1 C. & K. 686, 687; Roper *v.* Johnson, L. R. 8 C. P. 167; Roth *v.* Taysen, (C. A.) 12 T. L. R. 211; Brace *v.* Calder, (C. A.) [1895] 2 Q. B. 253; *conf.* Brown *v.* Muller, L. R. 7 Ex. 319; *Re* South African Trust Co. (C. A.) 74 L. T. 769.

[3] Lord Cockburn's statement is also sometimes repeated by American courts, which would not be likely to enforce it to its logical conclusion. See Foss, etc. Co. *v.* Bullock, 59 Fed. Rep. 83, 87; Strauss *v.* Meertief, 64 Ala. 299, 307; Claes, etc. Mfg. Co. *v.* McCord, 65 Mo. App. 507; Walsh *v.* Myers, 92 Wis. 397.

here, and that question being left for subsequent discussion, it may be laid down as a more logically coherent and more practically useful statement that the promisee may, if he thinks proper, treat the repudiation of the other party as a ground for putting an end to the contract, as shown in the earlier part of this article. If this course is adopted no rights under the contract can remain, though a quasi-contractual right to recover the value of anything which has been done will survive. Or the promisee may decline to continue to perform and sue the promisor for his breach of contract. Ordinarily, of course, a plaintiff in an action upon a contract cannot succeed if he has himself failed to perform at the proper time; but if that failure to perform was excused by the defendant's own conduct this principle does not apply. The authorities furnish abundant illustration of this when the excuse for the plaintiff's failure to perform consisted in a prior serious breach of the contract by the defendant.[1] The same principle covers the case of repudiation without an actual breach of contract. The reason why the plaintiff must ordinarily have performed in order that he may recover is the same reason which underlies the doctrine of failure of consideration. The mutual performances in a bilateral contract are, barring exceptional cases, intended to be given in exchange for each other, and if the exchange fails on one side owing to defective performance, the other party may likewise decline to perform. This reason was pretty well hidden during the early development of the doctrine under the terminology of implied conditions, but it is sufficiently apparent at the present day. Now, if it be an excuse which will justify a promisor in breaking his promise that his co-contractor has failed to give the performance agreed upon as an exchange, it should likewise be an excuse that the co-contractor has made it plain, as by repudiation, that he will not give such performance when it becomes due in the future. A promisor can no more be expected to perform his promise when he is not going to receive counter-performance than when he actually has not received it. Baron Parke — a judge not likely to stretch too far the rules of the common law in order to work out justice — so held in Ripley *v.* M'Clure.[2]

Neither where the plaintiff's excuse for his own non-performance is the defendant's actual breach of the contract nor where that excuse is a prospective breach because of repudiation does the plaintiff terminate the contract merely by availing himself of his excuse.

---

[1] See Parsons on Contracts (8th ed.), ii. 790.

[2] 4 Ex. 345.

The contract still exists, but one party to it has a defence and an excuse for non-performance. It may be thought that this statement differs from that of Lord Cockburn's second alternative only in words. Even so, words have their importance. If wrongly used, wrong ideas are sure to follow, and wrong decisions follow wrong ideas. It is a source of serious confusion in the cases that a contract is frequently spoken of as "rescinded" or "put an end to," when in truth one party to the contract has merely exercised his right to refuse to perform because of the wrongful conduct of the other party.[1] To be sure it frequently makes little practical difference whether this is the case or whether the contract is in fact rescinded. Where the only question that arises is in regard to the liability of a defendant for his refusal to perform the result is the same whether the whole contract is rescinded or whether it still subsists subject to a defence on the part of the defendant. But if the defendant seeks by counter-claim or cross-action to establish a right on his part to damages, his success depends on the existence of the contract. And more than one court has been led into the error of holding that no such right of action existed — that a voluntary exercise of the right to refuse to continue performance necessarily involved a total termination of the contract.[2]

---

[1] This error is adverted to in Anvil Mining Co. *v.* Humble, 153 U. S. 540, 551. The plaintiff in that case had ceased to perform because of a breach of contract by the defendant and sought to recover damages. Brewer, J., delivering the opinion of the court, said (p. 551): "It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his [its ?] non-performance. But no such proposition as that is contained in that instruction. It only lays downs the rule, and it lays that down correctly, which obtains when there is a breach of contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrong-doing of the other party has brought about. See, also, Hayes *v.* Nashville, 80 Fed. Rep. 641, 645.

[2] Cox *v.* McLaughlin, 54 Cal. 605; Porter *v.* Arrowhead Reservoir Co., 100 Cal. 500, 502; Palm *v.* Ohio, etc. R. R. Co., 18 Ill. 217; Howe *v.* Hutchison, 105 Ill. 501; Lake Shore, etc. Ry. Co. *v.* Richards, 32 N. E. Rep. 402 (Ill. Sup. Ct. 1892); Jones *v.* Mial, 79 N. C. 164. These cases hold that though a serious breach of contract will justify the other party in treating the contract as rescinded and so refusing to continue to perform, yet at least unless the breach amounts to actual prevention the party aggrieved cannot, if he ceases to perform, sue on the contract. The late Illinois case cited was, however, reversed on rehearing, and though somewhat limited in its language, perhaps overrules the earlier decisions in the same state. 152 Ill. 59, 80, 82. The first California decision was chiefly based on the early Illinois case. So in Hochster *v.* De La Tour, 2 E. & B. 678, counsel for the defendant, though their case did not require it,

Further, in order to exercise his right to rescind a contract, an injured party must indicate his election so to do by positive action,[1] but if he only wishes to refrain from performing his part of the contract, he is not seeking to assert an affirmative right, but standing on the defensive. He need do nothing except refrain from performing or receiving performance until he sues or is sued, when he should plead the cause which justifies his non-performance.[2] Of course he may waive this justification, but only by some positive action or estoppel.[3]

---

based their whole argument on the assumption that repudiation was equivalent to an offer to rescind, and that if the aggrieved party did not continue to hold himself ready and willing to perform he could not sue upon the contract.

In Bethel *v.* Salem Improvement Co., 93 Va. 354, also, the plaintiff was not allowed to recover for loss of profits, after having ceased to perform owing to the defendant's breach of contract.

Citations need not be multiplied to prove the error of the foregoing decisions and the right of the plaintiff to cease performance upon the defendant's repudiation and yet sue upon the contract. Cort *v.* Ambergate, etc. Ry. Co., 17 Q. B. 127; Ripley *v.* M'Clure, 4 Ex. 345; Marshall *v.* Mackintosh, 78 L. T. 750; Leeson *v.* North British, etc. Co., Ir. R. 8 Co. L. 309; Anvil Mining Co. *v.* Humble, 153 U. S. 540; McElwee *v.* Bridgeport Land, etc. Co., 54 Fed. Rep. 627 (C. C. A.); Cherry Valley Works *v.* Florence, etc. Co., 64 Fed. Rep. 569 (C. C. A.); Martin *v.* Chapman, 6 Port. 344; Baldwin *v.* Marqueze, 91 Ga. 404; Riley *v.* Walker, 6 Ind. App. 622; Lowe *v.* Harwood, 139 Mass. 133; Lee *v.* Briggs, 99 Mich. 487; Armstrong *v.* St. Paul, etc. Co., 48 Minn. 113; Wharton *v.* Winch, 140 N. Y. 287; Reynolds *v.* Reynolds, 48 Hun, 142.

Another instance of the confusion of ideas due to the improper use of words here criticised may be found in Fox *v.* Kitton, 19 Ill. 519, where the court says that there is no conflict between the views of Parke, B., and the decision of Hochster *v.* De La Tour, 2 E. & B. 678, since Parke, B., said in Phillpotts *v.* Evans, 5 M. & W. 475, 477: "The notice (that he will not receive the wheat) amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the mean time, and rescinds the contract." This, the Illinois court adds, "is in strict accordance with the principles recognized in . . . Hochster *v.* De La Tour." Now Parke was using the word "rescinds" in its true sense. What he meant and what he said was that the seller might at his option terminate the contract. The Illinois court thought he was using the word in the improper way in which Lord Coleridge did, and that his meaning was that the seller might, without himself performing, so act as to entitle himself to sue the buyer immediately for breach of the contract — a doctrine Parke expressly denied both in Phillpotts *v.* Evans and Ripley *v.* M'Clure, 4 Ex. 345, 359. The mistake made in Fox *v.* Kitton is repeated in Kadish *v.* Young, 108 Ill. 170.

[1] 14 HARVARD LAW REVIEW, 329.

[2] Where the ground of non-performance is an actual breach of contract by the other party, it is an obvious consequence of the rule of common-law pleading which required the plaintiff to allege and prove his own performance, that he would fail if he had not duly performed, though the defendant had not manifested any election. Changes in modern pleading cannot have affected the substantive law on this point. Where the ground of non-performance is repudiation or a prospective breach, there should be no difference, for the essential nature of the defence is the same.

[3] See Langdell, Summary of Contracts, § 177; Harriman on Contracts, 163–167.

If it is clear that one party to a contract is going to be unable to perform it the other party should be excused from performing. The excuse is the same as in cases where a wilful intention not to perform is manifested. The party aggrieved is not going to get what he bargained for in return for his performance. It is immaterial to him, and it should be immaterial to the court whether the reason is because the other party cannot or because he will not do what he promised. Even if the prospective inability is due to *vis major* this should be true.[1]

There is some difficulty in determining when it is sufficiently certain that one side of a contract will not be performed, to justify a refusal to perform the other side. Certainly if a party announces that he cannot perform, the other party is justified in taking him at his word.[2] Destruction of the subject-matter of the promise of one party is clearly a defence to the other.[3] Transfer to a third person of property forming the subject-matter of the contract is not so clear, since it is possible that the grantor may recover the title in time to fulfil the contract, but ordinarily the chance seems so remote that the defence should be allowed.[4] Insolvency of one party to a contract of sale is not always sufficient reason for refusal to perform by the other, for an assignee or trustee in insolvency or bankruptcy may find it for the advantage of the insolvent estate to

---

[1] Langdell, Summary, § 158, and see cases in the following notes.

[2] But it must be a clear and positive statement. Smoot's Case, 15 Wall. 36. See, also, *Re* Phœnix Bessemer Steel Co., 4 Ch. D. 108.

[3] 9 HARVARD LAW REVIEW, 106. Courts of equity in some jurisdictions have, however, established an exception to this rule in the case of contracts for the sale of real estate. 9 HARVARD LAW REVIEW, 111.

[4] Fort Payne, etc. Co. *v.* Webster, 163 Mass. 134; James *v.* Burchell, 82 N. Y. 108. *Contra* are Garberino *v.* Roberts, 109 Cal. 125; Webb *v.* Stephenson, 11 Wash. 342. See, also, Joyce *v.* Shafer, 97 Cal. 335; Shively *v.* Semi-Tropic, etc. Co., 99 Cal. 259. In the latter cases the court cites decisions establishing the doctrine that a man may contract to sell land which he does not own, and draws the inference that if the seller ceases to own land which is the subject of a contract it does not excuse the other party. The inference does not seem warranted. In Ziehen *v.* Smith, 148 N. Y. 558, at the time of performance there was an outstanding lien on the property, of which neither buyer nor seller knew at the time of entering into the contract. The buyer, without demanding fulfilment of the contract, at once brought suit to recover part of the price which he had paid. The court held he could not recover, as the incumbrance was one which was in the power of the vendor to remove, and he might have done so if requested. This decision was followed in Higgins *v.* Eagleton, 155 N. Y. 466. In the absence of any fraudulent concealment the determining question should be, Would a reasonable man be warranted in inferring that the contract would not be carried out? See Forrer *v.* Nash, 35 Beav. 167; Brewer *v.* Broadwood, 22 Ch. D. 105; Lytle *v.* Breckenridge, 3 J. J. Marsh. 663; Payne *v.* Pomeroy, 21 D. C. 243.

complete the bargain, and if so he ought to have that right.[1] But no one is obliged to give credit to one who is insolvent or bankrupt. Insolvency or bankruptcy affords a defence to any such contractual obligation, and payment may be required on delivery, though the contract expressly provides for a term of credit.[2] And if a contract is of such a nature that an assignee cannot carry it out, insolvency will excuse further performance by the other party.[3] These seem to be the only cases in which prospective inability of one party is sufficiently certain to be a defence to the other party.

III.

The final question remains, When may the injured party bring his action upon the contract? If a technical declaration were as much thought of to-day as it was once, the question could hardly have become troublesome. From a technical point of view, it seems obvious that in an action on a contract the plaintiff must state that the defendant broke some promise which he had made. If he promised to employ the plaintiff upon June 1, the breach must be that he did not do that. A statement in May by the defendant that he was not going to employ the plaintiff upon June 1 can be a breach only of a contract not to make such statements. It is perhaps not wholly by chance that the doctrine of anticipatory breach has arisen as the exactness of common-law pleading has become largely a thing of the past; for the science of special pleading, in spite of the grave defects attending it, had the great merit of making clear the exact questions of law and fact to be decided.

The matter is so plain on principle that theoretical discussion is hardly possible[4] except to make certain distinctions, which have

---

[1] Leake, Contracts (3d ed.), 753, 1095, and cases cited; Rappleye *v.* Racine Seeder Co., 79 Ia. 220, 228; Brassel *v.* Troxel, 68 Ill. App. 131.

[2] See authorities above cited. Also, Lennox *v.* Murphy, 171 Mass. 370, 373; Diem *v.* Koblitz, 49 Ohio St. 41; Pardee *v.* Kanady, 100 N. Y. 121; Dougherty Bros. *v.* Central Bank, 93 Pa. 227; Lancaster Bank *v.* Huver, 114 Pa. 216. Mere doubts of solvency, even though reasonable, furnish no defence to the literal performance of a contract. C. F. Jewett Publishing Co. *v.* Butler, 159 Mass. 517.

[3] Leake, Contracts (3d ed.), 1097; *Ex parte* Pollard, 2 Low. 411; Chemical Nat. Bank *v.* World's Fair Exposition, 170 Ill. 82.

[4] It need hardly be said that the doctrine of anticipatory breach is peculiar to our law. In Mommsen's Beiträge zum Obligationenrecht, Abtheilung, 3, § 4, it is said: "The obligation must be already due. So long as the time of maturity has not arrived, the obligor has always a defence in case the creditor should endeavor to enforce the obligation."

And in the typical case of one who regardless of his contract to sell and deliver in

not always been observed, and which, if observed, are a sufficient answer to the claims of practical convenience that furnish the only support for the advocates of the doctrine of anticipatory breach. It seems desirable, also, to explain certain early cases which have led to some confusion, and thereby show the lack of historical basis for the doctrine; and of this first.

In Y. B. 21 Edw. IV. 54, pl. 26, Choke, J., says: "If you are bound to enfeoff me of the manor of D. before such a feast, if you make a feoffment of that manor to another before the said feast, notwithstanding that you repurchase the property before the said feast, still you have forfeited your obligation because you were once disabled from making the feoffment." [1] This and similar statements are repeated several times in the early books.[2]

What Choke was talking about was a bond with a condition. This appears from the case itself where his remark was made as an illustration, and so it was understood.[3] At the present day a bond with a condition to convey before a certain day would be regarded as in substance the equivalent of a covenant to pay on or after the day the penal sum of the bond (for which the law would substitute appropriate damages) if a conveyance was not made before the day. That does not represent the early understanding of such an instrument. The words of a bond, which are still used, acknowledging an immediate indebtedness, and adding a proviso in which case the instrument is to become void, had a literal meaning for our ancestors. "A specialty debt was the grant by deed of an immediate right, which must subsist until either the deed was cancelled or there was a reconveyance by a deed of release." [4] It has been frequently pointed out that a debt was not regarded in our early law as a contractual right but a property right, and a deed creating a debt was not looked upon, as it is to-day, as a promise to pay money, but as a grant or con-

---

the future specific property to A sells and delivers it to B, Oesterlen, Der Mehrfache Verkauf, pp. 17, 18, says: "The temporary impossibility of performance due to the first delivery is wholly immaterial if it is removed at the proper time." . . . "When fulfilment is not made to the latter (*i. e.* A) at the proper time, then for the first time has a legal injury been done."

[1] In Sir Anthony Main's Case, 5 Coke, 20 b, 21 a, this passage is literally translated from the Year Book, and it is to Coke, probably, that the later currency of the citation is due.

[2] In 1 Rolle's Ab. 447, 448, under the title "Condition," this and several other similar cases are put. See, also, 5 Viner's Ab. 224.

[3] This is evident, *e. g.* from Rolle's classification of the authority under "Condition."

[4] 9 HARVARD LAW REVIEW, 56, by Professor Ames.

veyance of a sum of the grantor's money to the grantee.[1] Accordingly a bond was closely analogous to a mortgage, — a conveyance with a provision of defeasance attached. If the condition was or became impossible there remained an absolute debt created by the bond.[2] Choke's idea seems to have been that when the obligor of the bond sold the property, the condition became at that moment impossible of performance. There was, therefore, at that moment, by virtue of the bond itself, an absolute indebtedness, and this indebtedness, having once become absolute, could not subsequently be qualified. The condition could not be temporarily in abeyance.

Whether this view of the law was that generally taken by the contemporary judges, and, if so, when it gave way to a more modern conception, is not very material to this discussion, but it may be mentioned that Choke's statement seems inconsistent with the opinions of writers of authority not long afterwards.[3] What is material to observe is that, whichever way the point is decided, these authorities have no bearing upon the question of the immediate right to sue upon the repudiation of a contract. It may safely be asserted that Choke and his contemporaries and successors would all have agreed that a covenant to convey land before a certain feast, or a covenant to pay damages if the covenantor failed to convey land before a certain feast, could in no event have been sued upon before the feast.

---

[1] Parol Contracts prior to Assumpsit, by Professor Ames, 8 HARVARD LAW REVIEW, 252; Pollock & Maitland, Hist. Eng. Law (2d. ed.), ii. 205; Langdell, Summary of Contracts, § 100.

[2] Vynior's Case, 8 Coke, 81 b, 83 a; Perkins, Profitable Book, §§ 736, 757; 1 Rolle's Ab. 419 (c) pl. 2; Ib. 420 (E) pl. 1, 2. The last passage reads: "If the condition of a bond or feoffment is impossible when it is made it is a void condition, but the obligation or feoffment is not void but single, because the condition is subsequent. But if a condition precedent be impossible when it is made the whole is void, for nothing passes before the condition is performed." Perkins (§ 757) gives a case of a condition originally possible, but subsequently becoming impossible.

[3] Perkins, Profitable Book, § 800: "And there is a diversity when the condition is to be performed on the part of the feoffor or grantor, etc., and when on the part of the feoffee or grantee, etc. For when it is to be performed on the part of the feoffee or grantee, it behoveth him that he be not disabled at any time to do or perform the same."

§ 801. "But when the condition is to be performed on the part of the feoffor or grantor, although they are disabled to perform it at any time before the day on which it ought to be performed, yet if they are able to perform the same at the day, etc., it is sufficient, except in special cases." Illustrations are also given by the author.

This was written in the first half of the sixteenth century. Coke adopted the diversity (Co. Litt. 221 b); but neither author gives a satisfactory reason for it.

In the case put by Choke the condition was to be performed by the obligor, grantor of the bond.

When, therefore, Fuller, C. J., in a case recently decided by the Supreme Court of the United States, asserts, "It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract," [1] it must, with deference, be said that the learned judge is mistaken. The mistake is perhaps more pardonable than it would otherwise be, had not an English court fallen into the same error. In Ford *v.* Tiley,[2] Bayley, J. in delivering the opinion of the court, draws the conclusion from some of the old authorities above referred to "that where a party has disabled himself from making an estate he has stipulated to make at a future day, by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and is liable to be sued before such day arrives." [3] This was not, so far as appears, necessary to the decision of the case. The decision seems to have been correct, as will presently be shown, but Bayley's remark is noteworthy as the first statement in the English books authorizing the idea that an action may be brought on a promise before it is broken. It is to be noticed that this remark is confined to the case of an estate, and is not made as laying down a general principle of the law of contracts.[4]

In 1846 there were decided two cases in which a defendant was held liable for the breach of a promise to marry. In one of these cases [5] the defendant's promise was alleged to be simply to marry the plaintiff; in the other case "to marry her within a reasonable time next after he should thereunto be requested." [6] In both cases the defendant was held liable without any request by the plaintiff.

These cases did not profess to establish any general doctrine

[1] Roehm *v.* Horst, 20 Supr. Ct. Repr. 780, 787. It is also stated in the opinion (p. 783) that this was "not disputed." If so, the counsel for the defendant conceded more than they should.

[2] 6 B. & C. 325 (1827). But the error is pointed out, though perhaps not conclusively shown, in the able opinion of Wells, J., in Daniels *v.* Newton, 114 Mass. 530. It is also adverted to in the argument of counsel for the defendant in Short *v.* Stone, 8 Q. B. 358, 364, and in Lovelock *v.* Franklyn, 8 Q. B. 371, 376.

[3] 6 B. & C. 325, 327.

[4] Bayley's remark was repeated as representing the law in Heard *v.* Bowers, 23 Pick. 455, 460; but in that case, as the impossibility was not due to the voluntary act of the promisor, the rule was held inapplicable. In Daniels *v.* Newton, 114 Mass. 530, the *dictum* in Heard *v.* Bowers was repudiated.

[5] Caines *v.* Smith, 15 M. & W. 189.

[6] Short *v.* Stone, 8 Q. B. 358.

that a contract could be broken before the time for its performance. Moreover, Parke, B., twice expressly ruled the contrary at about this time;[1] and Lord Denman expressed a similar opinion.[2]

So the matter stood in 1852 when the case of Hochster *v.* De La Tour[3] was decided. In that case the plaintiff had entered into a contract with the defendant to serve him as a courier for three months beginning June 1, 1852. On May 11, the defendant wrote to the plaintiff declining his services. The action was begun May 22, and, after a verdict for the plaintiff, objection was taken that the action was prematurely brought. Counsel for the defendant, however, argued — unnecessarily so far as the immediate case was concerned — that the plaintiff, having taken other employment, had terminated the contract. Lord Campbell, in delivering the opinion of the court in favor of the plaintiff, showed that the situation would be unfortunate if the plaintiff, as a condition of getting a right of action, must decline other employment and hold himself ready to perform until June 1. From this, apparently misled by the argument of counsel, Lord Campbell drew the conclusion that the plaintiff must have an immediate right of action; and also drew the conclusion from the earlier cases already referred to[4]

---

[1] Phillpotts *v.* Evans, 5 M. & W. 475, 477 (1839): "I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it. The defendant might then have chosen to take it, and would have been guilty of no breach of contract, for all that he stipulates for is that he will be ready and willing to receive the goods, and pay for them, at the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them; it was a mere nullity, and it was perfectly in his power to accept them, nevertheless; and, *vice versa*, the plaintiffs could not sue him before."

In Ripley *v.* M'Clure, 4 Ex. 345 (1849), Parke reiterated his statement that a notice before the time for performance could not be a breach of contract, but held that it might excuse the other party from continuing to perform.

[2] Lovelock *v.* Franklyn, 8 Q. B. 371, 378 (1846): "This distinction shows that the passage cited from Lord Coke is inapplicable; that proves no more on the point now before us than that, if an act is to be performed at a future time specified, the contract is not broken by something which may merely prevent the performance in the mean time." As Lord Denman had immediately before taken part in the decision of Short *v.* Stone, 8 Q. B. 356, it may be assumed he did not regard that decision as inconsistent with his later remarks.

In Thomson *v.* Miles, 1 Esp. 184, Lord Kenyon had said that it had been solemnly adjudged that if a party sells an estate without having title, but before he is called upon to make a conveyance, by a private act of Parliament, gets such an estate as will enable him to make a title, that is sufficient."

[3] 2 E. & B. 678.

[4] He adds the case of Bowdell *v.* Parsons, 10 East, 359, as establishing the proposi-

that incapacity before the time for performance had already been settled by decision to be a breach, neglecting to notice the distinction, hereafter adverted to, between a fixed future day and a day which may be fixed at any time in the present or future.

These two misapprehensions of Lord Campbell, for as such they must be regarded, make the case an unsatisfactory one. It has, however, settled the law in England,[1] and the doctrine for which it stands has been adopted in Canada,[2] in this country either by *dictum* or decision in the federal courts,[3] and in the courts of a majority of the states in which the question has arisen.[4] There are strong opinions to the contrary,[5] however, and in many states

---

tion that "if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them." In fact, the contract in that case was to deliver upon request.

[1] Frost *v.* Knight, L. R. 7 Ex. 111; Johnston *v.* Milling, 16 Q. B. D. 460; Synge *v.* Synge, (C. A.) [1894] 1 Q. B. 466; Roth *v.* Taysen, 73 L. T. 628. See, also, Danube, etc. Co. *v.* Xenos, 13 C. B. (N. S.) 825; Avery *v.* Bowden, 5 E. & B. 714; Reid *v.* Hoskins, 6 E. & B. 953; Roper *v.* Johnson, L. R. 8 C. P. 167; Brown *v.* Muller, L. R. 7 Ex. 319; *Re* South African Trust Co., 74 L. T. 769.

[2] Dalrymple *v.* Scott, 19 Ont. App. 477, 483.

[3] Roehm *v.* Horst, 20 Sup. Ct. Repr. 780, affirming 91 Fed. Rep. 345 (C. C. A.), which affirmed 84 Fed. Rep. 565; Grau *v.* McVicker, 8 Biss. 13; Dingley *v.* Oler, 11 Fed. Rep. 372; Foss, etc. Co. *v.* Bullock, 59 Fed. Rep. 83, 87; Marks *v.* Van Eeghen, 85 Fed. Rep. 853 (C. C. A). The Supreme Court long remained apparently undecided. Dingley *v.* Oler, 117 U. S. 490; Cleveland Rolling Mill *v.* Rhodes, 121 U. S. 255, 264; Pierce *v.* Tennessee, etc. R. R. Co., 173 U. S. 1, 12. See, also, Edward Hines Lumber Co. *v.* Alley, 73 Fed. Rep. 603 (C. C. A.).

Clark *v.* National Benefit Co., 67 Fed. Rep. 222, must now be regarded as overruled.

[4] Wolf *v.* Marsh, 54 Cal. 228; Fresno, etc. Co. *v.* Dunbar, 80 Cal. 530; Poirier *v.* Gravel, 88 Cal. 79; Remy *v.* Olds, 88 Cal. 537; Thomson *v.* Kyle, 39 Fla. 582; Fox *v.* Kitton, 19 Ill. 519; Follansbee *v.* Adams, 86 Ill. 13; Kadish *v.* Young, 108 Ill. 170; Engesette *v.* McGilvray, 63 Ill. App. 461; Kurtz *v.* Frank, 76 Ind. 594; Adams *v.* Byerly, 123 Ind. 368, 371; Crabtree *v.* Messersmith, 19 Ia. 179; Holloway *v.* Griffith, 32 Ia. 409; McCormick *v.* Basal, 46 Ia. 235; Platt *v.* Brand, 26 Mich. 173; Sheahan, *v.* Barry, 27 Mich. 217; Kalkhoff *v.* Nelson, 60 Minn. 284, 287; Bignall, etc. Mfg. Co. *v.* Pierce, etc. Mfg. Co., 59 Mo. App. 673; Claes, etc. Mfg. Co. *v.* McCord, 65 Mo. App. 507; Burtis *v.* Thompson, 42 N. Y. 246; Howard *v.* Daly, 61 N. Y. 362 (*conf.* Shaw *v.* Republic L. I. Co., 69 N. Y. 286, 293; Ferris *v.* Spooner, 102 N. Y. 10; Nichols *v.* Scranton, etc. Co., 137 N. Y. 471; Stokes *v.* McKay, 147 N. Y. 223; Benecke *v.* Haebler, 38 N. Y. App. Div. 344; Union Ins. Co. *v.* Central Trust Co., 157 N. Y. 633, 643; Hicks *v.* British Am. Assur. Co., 162 N. Y. 284; Schmitt *v.* Schnell, 14 Ohio C. C. 153; Stark *v.* Duvall, 7 Oklahoma, 213; Zuck *v.* McClure, 98 Pa. 541; Hocking *v.* Hamilton, 158 Pa. 107; Mountjoy *v.* Metzger, 9 Phila. 10; Burke *v.* Shaver, 92 Va. 345; Lee *v.* Mutual, etc. Assoc., 97 Va. 160; Davis *v.* Grand Rapids, etc. Co., 41 W. Va. 717.

[5] Daniels *v.* Newton, 114 Mass. 530; Carstens *v.* McDonald, 38 Neb. 858; King *v.* Waterman, 55 Neb. 324; Parker *v.* Pettit, 43 N. J. L. 512, 517; Stanford *v.* Mcgill, 6 N. Dak. 536.

the question is still undecided,[1] so that the final outcome in America is not yet certain.

The reasoning in Hochster *v.* De la Tour,[2] already adverted to, illustrates a distinction, which it is important to observe — the distinction between a defence and a right of action. This seems obvious, but it is frequently lost sight of, as it was in that case. Every consideration of justice requires that repudiation or inability to perform should immediately excuse the innocent party from performing, nor is any technical rule violated if the excuse is allowed. But it does not follow from this that he has an immediate right of action. It is a consequence of allowing such an excuse that when he brings an action he shall not be defeated by reason of the fact that he himself has not performed, since that failure to perform was excused by the defendant's fault. But though the defendant cannot defeat the action on this ground, any other defence is as effectual as ever, and that the action is prematurely brought is an entirely different defence.

Another important and frequently neglected distinction is that between an action for restitution and an action on the contract. Since repudiation affords immediate cause for rescission it also entitles an immediate suit for the restitution specifically or in money equivalent of whatever has been parted with by the innocent party.[3] Cases allowing this do not involve the consequence that an action might be brought at that time on the contract.

Again, it is often thought that to allow a plaintiff to sue and recover full damages before the time for the completion of all the defendant's performance is to allow the doctrine of anticipatory breach,[4] yet this is not the case. As soon as a party to a contract breaks any promise he has made, he is liable to an action. In such an action the plaintiff will recover whatever damages the breach has caused. If the breach is a trifling one such damages cannot well be more than the direct injury caused by that trifling breach. But if the breach is serious or is accompanied by repudia-

---

[1] The question is referred to but expressly left open in Day *v.* Connecticut, etc. Co., 45 Conn. 480, 495; Sullivan *v.* McMillan, 26 Fla. 543 (but see Thomson *v.* Kyle, 39 Fla. 582); Maltby *v.* Eisenhauer, 17 Kan. 308, 311; Dugan *v.* Anderson, 36 Md. 567; Pinckney *v.* Dambmann, 72 Md. 173, 182.

[2] 2 E. & B. 678.

[3] 14 HARVARD LAW REVIEW, 322.

[4] Nichols *v.* Scranton, etc. Co., 137 N. Y. 471; Union Ins. Co. *v.* Central Trust Co., 157 N. Y. 633; Hocking *v.* Hamilton, 158 Pa. 107, illustrate this. These cases are unquestionably right. They do not involve the question of anticipatory breach, though in each of them the court seems to have thought so.

tion of the whole contract, it may and frequently will involve as a consequence that all the rest of the contract will not be carried out. This may be a necessary consequence of the situation of affairs or it may result simply from the plaintiff's right to decline to let the defendant continue performance, since even if all the remaining performance were properly rendered, the plaintiff would not get substantially what he bargained for. The plaintiff is entitled to damages which will compensate him for all the consequences which naturally follow the breach, and therefore to damages for the loss of the entire contract. This is no different principle from allowing a plaintiff in an action of tort for personal injuries to recover the damages he will probably suffer in the future. If the cause of action has accrued, the fact that the damages or all of them have not yet been suffered is no bar in any form of action to the recovery of damages estimated on the basis of full compensation. This is law where the doctrine of Hochster *v.* De la Tour is denied, as well as where it is admitted.[1]

Under this principle a right of action may accrue by breach of a subsidiary promise, long before the defendant's main performance is due, and the subsidiary promise may be an implied one. In any case where the plaintiff's performance requires the coöperation of the defendant, as in a contract of service or to make something from the defendant's materials or on his land, the defendant, by necessary implication, promises to give this coöperation, and if he fails to do so he is immediately liable though his only express promise is to pay money at a future day.[2] It seems settled, further, and perhaps by a fair implication, that there is in every bilateral contract an implied promise not to prevent performance by

---

[1] Mayne on Damages (6th ed.), 106 *et seq.*; Sutherland on Damages, §§ 108, 112, 113; Pierce *v.* Tennessee, etc. Co., 173 U. S. 1; Strauss *v.* Meertief, 64 Ala. 299; Howard Col. *v.* Turner, 71 Ala. 429; Ætna Life Ins. Co. *v.* Nexsen, 84 Ind. 347; Goldman *v.* Goldman, 51 La. Ann. 761; Sutherland *v.* Wyer, 67 Me. 64; Parker *v.* Russell, 133 Mass. 74; Cutter *v.* Gillette, 163 Mass. 95; Girard *v.* Taggart, 5 S. & R. 19; King *v.* Steiren, 44 Pa. 99; Chamberlin *v.* Morgan, 68 Pa. 168; Remelee *v.* Hall, 31 Vt. 582; Treat *v.* Hiles, 81 Wis. 280.

The contrary decisions of Lichtenstein *v.* Brooks, 75 Tex. 196, 198; Gordon *v.* Brewster, 7 Wis. 355 (*conf.* Treat *v.* Hiles, 81 Wis. 280; Walsh *v.* Myers, 92 Wis. 397), are not to be supported.

[2] Inchbald *v.* Western, etc. Co., 17 C. B. (N. S.) 733.

Ford *v.* Tiley, 6 B. & C. 325, was clearly correctly decided under this principle. The defendant promised to make a lease to the plaintiff as soon as he should become possessed of the property, which was then under lease to a third party. The defendant before the expiration of the prior lease executed another to the same lessee, thereby preventing possession reverting to him at the expiration of the previous lease.

the other party.[1] Such prevention will, therefore, in any case be an immediate breach of contract, and if of sufficiently serious character damages for the loss of the entire contract may be recovered. As countermanding work may have the legal effect of prevention in this country,[2] though it does not involve actual physical prevention, it will be a breach of contract at the time when a stoppage in the performance of the contract has been caused thereby.[3]

The time for the defendant's performance is frequently fixed in a contract, not by naming a definite day, but by some act to be done by the plaintiff — either a counter-performance or a request. If the defendant repudiates the contract, it excuses the plaintiff from doing a nugatory act, and, as in the case of any other condition which the defendant's conduct excuses, he cannot take advantage of its non-performance.[4] He is deprived of nothing thereby, except what he has indicated a willingness to go without, for he has said that even if the request be made he will not heed it, or if the counter-performance be offered he will not accept it. The case is very different where the defendant promises to pay on a fixed day, or when an outside event happens. To hold him immediately liable in such an event is to enlarge the scope of his promise, and entirely without his assent. If he prevented the time for his performance from coming, his assent might be dispensed with, but not otherwise.[5] The English cases prior. to Hochster

---

[1] Bishop, Contracts, § 1431; Indian Contract Act, sect. 53. But see Murdock *v.* Caldwell, 10 Allen, 299.

[2] See *ante*, p. 422. See, also, Cort *v.* Ambergate, etc. Ry. Co. 17 Q. B. 127, 145.

[3] Hosmer *v.* Wilson, 7 Mich. 294; Chapman *v.* Kansas City, etc. Ry. Co., 146 Mo. 481.

[4] The leading case for this well-settled doctrine is Cort *v.* Ambergate, etc. Ry. Co. 17 Q. B. 127. A few of the many other cases which might be cited are: Hinckley *v.* Pittsburg Steel Co., 121 U. S. 264; Dwyer *v.* Tulane, etc. Adms., 47 La. Ann. 1232; Murray *v.* Mayo, 157 Mass. 248; Canda *v.* Wick, 100 N. Y. 127.

The distinction here contended for is well brought out in Lowe *v.* Harwood, 139 Mass. 133. In that case there was a contract for an exchange of real estate. No time was fixed for performance. Before any tender or demand for performance the defendant repudiated the contract. Holmes, J., in delivering the opinion of the court, held that this "not only excused the plaintiff from making any tender and authorized him to rescind if he chose, but amounted to a breach of the contract. The contract was for immediate exchange, allowing a reasonable time for necessary preparations. In the absence of special circumstances, which do not appear, sufficient time had been allowed, even if any consideration of that sort could not be and was not waived by the defendant. The case is not affected by Daniels *v.* Newton, 114 Mass. 530, but falls within principles that have been often recognized."

[5] In Ford *v.* Tiley, 6 B. & C. 325, the time for performance was to be fixed by the defendant's coming into possession of certain property — an event depending on outside contingencies, which the defendant prevented from happening as expected. In the

v. De la Tour,[1] which are cited in support of the doctrine of anticipatory breach,[2] may be satisfactorily explained on these principles with possibly one exception.[3]

A great many of the cases are upon contracts of marriage;[4] and these cases may well be distinguished. Lord Cockburn said in Frost *v.* Knight: "On such a contract being entered into . . . a new status, that of betrothment, at once arises between the parties."[5] When a man promises to pay money or deliver goods at a future day, all he understands, all a reasonable man would understand, is that he will be ready to perform on the day. When a man promises to marry, his obligation, as he understands it and as it is understood, is wider, and includes some undertaking as to his conduct before the marriage-day. If this be so, marriage with another than the betrothed is an immediate breach, not directly of the promise to marry, but of the subsidiary obligation implied from it. As this breach necessarily involves a loss of the marriage, full damages could be recovered. Lord Cockburn tries to apply the same line of reasoning to other contracts, saying, "The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests."[6] But this is fanciful.

---

nature of the case, however, a party cannot prevent a day fixed by reference to the calendar from arriving.

[1] 2 E. & B. 678.

[2] Bowdell *v.* Parsons, 10 East, 359; Ford *v.* Tiley, 6 B. & C. 325; Caines *v.* Smith, 15 M. & W. 189. In Bowdell *v.* Parsons and Caines *v.* Smith the defendant promised to perform upon request, and later by making his own performance impossible excused the request. As to Ford *v.* Tiley, see *ante*. So in Clements *v.* Moore, 11 Ala. 35, — a decision before the days when anticipatory breaches were talked of, — the defendant was held liable for breach of a promise to marry on request without a request on his marriage with another than the plaintiff.

[3] Short *v.* Stone, 8 Q. B. 358. Here the promise was to perform a reasonable time after request. The defendant, by making his own performance impossible, clearly dispensed with the necessity of a request as such. It does not seem so clear why he should forego the "reasonable time." Coleridge, J., avoided the difficulty by a strained construction of the declaration, holding the promise to mean after request made within a reasonable time. The other members of the court simply say the request is dispensed with.

[4] Frost *v.* Knight, L. R. 7 Ex. 111; Kurtz *v.* Frank, 76 Ind. 594; Adams *v.* Byerly, 123 Ind. 368; Holloway *v.* Griffith, 32 Ia. 409; Sheahan *v.* Barry, 27 Mich. 217; Burtis *v.* Thompson, 42 N. Y. 246; Burke *v.* Shaver, 92 Va. 345. The distinction here suggested was referred to in Stanford *v.* Mcgill, 6 N. Dak. 536.

[5] L. R. 7 Ex. 111, 115.

[6] L. R. 7 Ex. 112, 114.

If true the action should be brought for breach of a promise to have the contract kept open. If there is such an implied obligation in any case there should be in case of negotiable paper, for in no other case is it more important that the promise should not be discredited before the time for performance. Yet it may be doubted if any court would apply the doctrine to bills and notes.[1]

The reason most strongly urged in support of the doctrine of anticipatory breach is, however, its practical convenience. It is said that it is certain that the plaintiff is going to have an action, it is better for both parties to have it disposed of at once. It may be conceded that practical convenience is of more importance than logical exactness, but yet the considerations of practical convenience must be very weighty to justify infringing the underlying principles of the law of contracts. The law is not important solely or even chiefly for the just disposal of litigated cases. The settlement of the rights of a community without recourse to the courts can only be satisfactorily arranged when logic is respected. But it is not logic only which is injured. The defendant is injured. He is held liable on a promise he never made. He has only promised to do something at a future day. He is held to have broken his contract by doing something before that day. Enlarging the obligation of contracts is perhaps as bad as impairing it. This may be of great importance. Suppose the defendant, after saying that he will not perform, changes his mind and concludes to keep his promise. Unless the plaintiff relying on the repudiation, as he justly may, has so changed his position that he cannot go on with the contract without injury, the defendant ought surely to be allowed to do this.[2] But if the plaintiff is allowed to bring an action at once this possibility is cut off. "Why," says Fuller, C. J., "should a *locus pœnitentiæ* be awarded to the party whose wrongful action has placed the other at such disadvantage?"[3] Because such is the

---

[1] Benecke *v.* Haebler, 38 N. Y. App. Div. 344. In Roehm *v.* Horst, 20 Supr. Ct. Repr. 780, 786, Chief Justice Fuller distinguishes the case of a note on the ground that the doctrine of anticipatory breach only applies to contracts where there are mutual obligations. This has not before been suggested, though in fact the cases where the doctrine has been applied have been cases of bilateral contracts. Lord Cockburn's line of reasoning is certainly as applicable to unilateral as to bilateral contracts. It would be interesting to know what Chief Justice Fuller would say to the case of a promissory note given in exchange for an executory promise, or of an instrument containing mutual covenants, one of which was to pay money on a fixed day, the party bound to the money payment having repudiated his obligation before it was due.

[2] Nilson *v.* Morse, 52 Wis. 240.

[3] Roehm *v.* Horst, 20 Sup. Ct. Repr. 780, 787.

contract the parties made. A promise to perform in June does not preclude changing position in May.[1]

But not only do logic and the defendant suffer, the very practical convenience which is the excuse for their suffering is not attained. A few illustrations from recent cases will show that as at present applied the doctrine of anticipatory breach is so full of pitfalls for the unwary as to be objectionable rather than advantageous practically. The doctrine is thus stated in the last English case where it was much considered. "It would seem on principle that the declaration of such intention (not to carry out the contract) is not in itself and unless acted on by the promisee a breach of contract. . . . Such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such."[2] The conception that a breach of contract is caused by something which the promisee does is so foreign to the notions not only of lawyers but of business men that it cannot fail to make trouble. If the promisee, after receiving the repudiation, demands or manifests a willingness to receive performance, his rights are lost. Not only can he not thereafter bring an action on the repudiation,[3] but "he keeps the contract alive for the benefit of the other as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance

---

[1] The California Civil Code, § 1440, provides: "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

This necessarily implies that if the notice is retracted the obligation cannot be enforced without an offer to perform. Yet in California the doctrine of anticipatory breach, which in effect denies the right of retraction, is followed, and no reference is made to this section of the Code. The California cases are cited *ante*, p. 433.

The North Dakota Civil Code has copied in § 3774 this provision of the California Code, but the Supreme Court of North Dakota has denied the doctrine of anticipatory breach. Stanford *v.* Mcgill, 6 N. Dak. 536.

[2] Johnstone *v.* Milling, 16 Q. B. D. 460, 472, per Lord Bowen. The late authorities continually refer to the necessity of the promisee acting on the repudiation. What action is necessary is not stated. It is to be noticed, however, that in Hochster *v.* De La Tour, 2 E. & B. 678; Frost *v.* Knight, L. R. 7 Ex. 111, and most of the other cases, there was no manifestation of election other than bringing an action.

[3] Zuck *v.* McClure, 98 Pa. 541; Dalrymple *v.* Scott, 19 Ont. App. 477.

which would justify him in declining to complete it."[1] This is a pretty severe penalty imposed upon the injured party for not seizing the right moment. When A repudiates his promise, what is more natural or reasonable than for B to write urging him to perform. Yet if B does so, it seems not only does he lose his right of immediate action, but he is bound to perform his own promise, though he has reason to expect A will not perform his.[2]

In Johnstone *v.* Milling,[3] the promissor stated that he could not get money enough to perform his promise. He made this statement "constantly in answer to the defendant's direct question, and at other times in conversation." It was held that this was not such a repudiation as would justify an action. Lord Esher, M. R., made the test, "Did he mean to say that whatever happened, whether he came into money or not, his intention was not to rebuild the premises,"[4] as he had promised, and the other judges expressed similar views. A distinction between inability and wilful intention not to perform is not of practical value. As far as the performance of the contract is concerned they are of equal effect, and should be followed by the same consequences.

In Dingley *v.* Oler,[5] the defendant had taken a cargo of ice from the plaintiff and agreed to make return in kind the next season, which closed in September, 1880. In July, 1880, the defendant wrote, "We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash, at the price you offered it to other parties here (fifty cents a ton), or give you ice when the market reaches that point." At the time when this letter was written ice was worth five dollars a ton. One does not need expert testimony to judge what probability there is of ice going down before the close of September to one tenth of the price for which it was selling in July, and yet the court held

---

[1] Frost *v.* Knight, L. R. 7 Ex. 111, 112. Quoted as stating the law in Leake, Cont. (3d ed.) 752.

[2] In accordance with this rule in Dalrymple *v.* Scott, 19 Ont. App. 477, the plaintiff lost his case. The defendant had repudiated the contract. The plaintiff did not manifest an election to treat that as an immediate breach, but on the contrary testified that he would have been willing to have accepted performance after the repudiation. When the time for performance had passed he brought an action. Judgment was given for the defendant, because the plaintiff had not performed or offered to perform on his part.

[3] 16 Q. B. D. 460.

[4] Page 468. There were also other grounds of decision to which the present criticism is not intended to apply.

[5] 117 U. S. 490.

the letter constituted no anticipatory breach of contract because the refusal was not absolute, but "accompanied with the expression of an alternative intention" to ship the ice "if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them." Surely a man must be well advised to know when he has the right to regard his contracts as broken by anticipation.

In contracts for the sale of goods when there is a repudiation of the contract before the time for performance, the question often arises as to the basis on which the plaintiff's damages are to be calculated. It is often thought that the decision of this question turns on whether a breach of the contract is made at the date of the repudiation or at the date when the goods were to be delivered. But this is not so. Even though the doctrine of anticipatory breach is not adopted the plaintiff should, if he knows the contract is going to be broken, as much as if it has already been broken,[1] take any reasonable action to mitigate the damages which the defendant's action will cause, so that the price of the goods at the time when they should have been delivered will not necessarily be the sole criterion of the loss. On the other hand, even though the breach be regarded as having occurred at the time of repudiation, yet it was a breach of a contract to deliver at a later day, and, if it was not a reasonable thing under the circumstances to take some action at the earlier day the damages must be calculated on the basis of the price of the goods at the time when delivery should have been made. By no reasoning can the contract be treated as a contract to deliver goods at the date of the repudiation.[2]

Samuel Williston.

---

[1] This is doubtless contrary to the early cases (Leigh *v.* Patterson 8 Taunt. 540; Phillpotts *v.* Evans, 5 M. & W. 475), but seems in accord with reason and with the principle of the American cases cited, *ante*, p. 422.

[2] The modern decisions on the point seem to have been made exclusively by courts which recognize the doctrine of anticipatory breach. Some of these decisions go very far in requiring the plaintiff to take affirmative action at his own risk. See Brown *v.* Muller, L. R. 7 Ex. 319; Roper *v.* Johnson, L. R. 8 C. P. 167; Roth *v.* Taysen, 12 T. L. R. 211 (C. A.); *Re* South African Trust Co., 74 L. T. 769; Ashmore *v.* Cox, [1899] 1 Q. B. 436; Roehm *v.* Horst, 20 Sup. Ct. Repr. 780.